

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Nondiscrimination in the Distribution of Interactive)	CS Docket No. 01-7
Television Services Over Cable)	

REPLY COMMENTS OF MOTOROLA

Motorola, Inc. (Motorola) hereby submits these comments in response to the FCC's Notice of Inquiry in the above-captioned proceeding.¹ Motorola takes this opportunity to state: (1) there is no need for regulatory action concerning the nascent Interactive Television ("ITV") marketplace, including services, transmission or equipment, and (2) issues regarding the retail availability of set-top equipment should be dealt with in the appropriate rulemaking, CS-97-80.

Motorola's position as a major consumer electronics manufacturer, designing everything from cable modems and set-top equipment to wireless handsets, provides it with a unique perspective on developing ITV technology. Motorola's Network Sector is a leading provider of advanced communications network systems, including digital consumer set-top terminals, designed to deliver broadband services, including ITV.

¹ *Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, CS Dkt. No. 01-7, *Notice of Inquiry* (rel. Jan. 18, 2001) ("NOI").

I. It is Premature to Regulate ITV Services, Transmission or Equipment

As the majority of commenters have indicated, the ITV marketplace is still developing. The evidence presented in this proceeding demonstrates that there is no basis for FCC regulation of ITV, including the equipment necessary to deliver ITV products and services to consumers, since allegations of anti-competitive behavior in this area are completely speculative. No party has provided any evidence that cable operators discriminate against unaffiliated ITV providers. In fact, the only information submitted into the record thus far suggests that cable operators have no incentive to discriminate against unaffiliated ITV providers, whether in the service or equipment area.² This point is demonstrable. Gemstar-TV Guide International, for example, an unaffiliated ITV provider, recently signed a long-term agreement for carriage of its Electronic Program Guide (“EPG”) by Comcast Corporation and Charter Communications, even though both Comcast and Charter are affiliated with TV Gateway, an EPG provider that competes with Gemstar.³ Such relationships develop without government intervention when it is advantageous to the parties involved and operationally viable. Cable system operators will contract for the content of unaffiliated ITV operators when consumers value it.⁴

² See, e.g., National Cable Telecommunications Association Comments at Att. A-28-35 (filed March 19, 2001)(disputing *Notice*’s assumption that cable operators have the incentive to favor affiliated ITV service providers), *id.* at Att-B-2-3 (“One cannot presume that even an input monopolist would necessarily have strong incentives to significantly disfavor rivals of its downstream affiliate: those retail-market rivals are also its customers for access services, so handicapping them entails a loss of profitable access sales. To the extent that independents may be more efficient than the monopolist’s affiliate or provide valuable variety to consumers, discriminating against them will cause a significant reduction in the monopolist’s access business, and therefore may prove unprofitable.”)(“NCTA comments”).

³ See, e.g., Steve Donohue, *Gemstar Guides Comcast Home*, Multichannel News, Mar. 26, 2001 (noting that Comcast signed 20-year deal to license Gemstar’s interactive program guide).

⁴ See, e.g., Reply Comments of the Commissioner of Baseball at 2 (filed April 20, 2001) (“In a marketplace free from governmental influence the providers of conventional television programming content, ITV services, and distributors can reach negotiated solutions that will benefit all involved, rather than just those

There are bandwidth capacity constraints on any cable system, especially with regard to the upstream path, which limit the number of applications that can be supported simultaneously. Each system operator must prioritize the applications it will support, considering consumer expectations, the number of simultaneous users, peak usage patterns, and the quality standard that operator supports, among other factors. Unlimited capacity of any system is not realistic. The best method to allocate limited bandwidth resources among competing applications is to allow market forces to function. Regulation aimed at nondiscrimination of carriage on cable systems carrying ITV, as MSTV suggests, should not be considered at this time.⁵ The regulatory effort to enact such provisions would be substantial and would only serve to stifle innovation and deployment of new applications.

Numerous commenters have also submitted that the ITV business is characterized by low barriers to entry, many competitors, and significant investment and innovation relative to both ITV services and equipment. Premature regulation would harm both consumers and investors by increasing business uncertainty, increasing costs and dampening investment, at a time of particularly volatile market conditions. Such action would also conflict with the Communications Act and Commission policy and precedent.⁶ In particular, we disagree with MSTV's view that "it is essential that the Commission take a swift action to prevent anticompetitive behavior while ITV is still in

favorable by regulation. Such negotiated solutions will inevitably produce the quality and quantity of ITV services that consumers will demand.").

⁵ See Comments of Association for Maximum Service Television at 6,7 (filed March 19, 2001)("MSTV Comments").

⁶ See, e.g., AT&T Comments at 1-30 (filed March 19, 2001) (noting that ITV marketplace is nascent and marked by numerous competitors); NCTA Comments at 7-14 (filed March 19, 2001)(noting that ITV development and deployment are nascent); AOL Time Warner Comments (filed March 19, 2001) at 3-8 (same).

its embryonic, developmental stage.”⁷ Motorola believes quite the opposite: that the Commission should be particularly careful with regard to the regulation of developing technologies. Such regulation may easily have unintended consequences, altering the viability of ITV. Indeed, MSTV’s proposals are exactly the type of “prospective, prophylactic regulation” that Chairman Powell has openly criticized.⁸

Moreover, as AOL Time Warner points out, the Commission’s rules regarding retail availability of set-top equipment at retail ensure that competing ITV providers are able to manufacture and market ITV-capable digital set-top equipment that will operate over cable systems, and need not access the cable operator’s existing set-top equipment. These provisions undercut any alleged ability of the cable operator to discriminate against unaffiliated ITV providers, since the ITV provider may chose to manufacture, or partner with another company to manufacture or market, its own cable set-top equipment.⁹ Indeed, several ITV providers are already offering their interactive services through stand-alone consumer devices that are designed to work in conjunction with a subscriber’s television set and chosen source for video programming (*e.g.*, WebTV and AOLTV). In fact, the FCC noted in its *AT&T-MediaOne Merger Order* that the rules regarding retail availability of set-top equipment, “limit MVPDs’ ability to exercise

⁷ See MSTV Comments at 5.

⁸ See, *e.g.*, Separate Statement of Commissioner Michael K. Powell, *Petition of Bell Atlantic Corporation for Relief From Barriers to Deployment of Advanced Telecommunications Services*, CC Dkt. No. 98-1, *MO &O* (rel. Aug. 6, 1998).

⁹ See AOL Time Warner Comments at 15-16 (“Unaffiliated ITV providers thus are free to develop and market their own, ITV-capable cable STBs, thereby bypassing the cable operator’s own STB--and any alleged ability to discriminate against unaffiliated ITV providers contained therein--altogether.”)

excessive market power and dominate the equipment market” (§ 100) and “alleviate concerns regarding competition in the production and sale of set-top boxes” (§ 97).¹⁰

Motorola also disagrees with Canal+’s statements regarding alleged limitations of POD modules. As Motorola explained in its comments and reply comments in the retail sale proceeding (which it incorporates by reference), the POD-Host option is available today as a viable alternative to traditional set-top equipment. Consumer electronics manufacturers, such as Panasonic and Philips, have built host devices based on the existing OpenCable specifications.¹¹ Samsung has also demonstrated POD enabled television sets at the Consumer Electronics Show in January. Moreover, the OpenCable specifications do not prevent manufacturers from developing or licensing the technology necessary to provide advanced features and functions with their host devices.¹² Regarding interoperability, Motorola notes that CableLabs is taking steps to facilitate the development and deployment of portable ITV applications through its “middleware” initiative. This initiative is designed to serve as a “road map” for content providers to build interactive applications that interoperate with broadband cable networks and OpenCable-compliant set-top equipment and digital TV sets.¹³ With respect to Canal+’s claims concerning the technical inadequacy of the POD module, copy protection and t-commerce, any set-top terminal can implement the same Internet standard security

¹⁰ *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group to AT&T Corporation*, CS Dkt. No. 99-251, *MO&O* (rel. June 6, 2000).

¹¹ *See NCTA Defended Cable Efforts to Create New Retail Market*, Communications Daily, April 3, 2001, at 6 (citing TechTrends study predicting that Panasonic and Philips combined would account for 1 million of the 3.7 million digital set-tops that leading MSO AT&T Broadband was expected to deploy this year).

¹² *See, e.g.*, Motorola Comments, filed in CS Dkt. No. 97-80, at 7-9 (Nov. 15, 2000) (“Motorola Retail Sale Comments”); Motorola Reply Comments, filed in CS Dkt. No. 97-80, at 8-9 (Dec. 18, 2000) (“Motorola Retail Sale Reply Comments”).

¹³ *See* AT&T Comments at 10 & n. 29 (quoting TWC CEO Joe Collins on middleware).

methods (SSL) that are successfully used on the Internet today, and there is no indication that these mechanisms, which are the basis for all e-commerce on the Internet, are insufficiently secure for consumers or e-merchants.

It is ironic that there is a call to regulate this developing ITV technology in ways that the Commission has increasingly rejected in other, more mature markets. EarthLink, for example, asks that telecommunications regulations requiring the unbundled sale of equipment and services be introduced into the ITV/cable area. Specifically, EarthLink suggests that the FCC should clarify that set-top equipment be considered customer premises equipment “required to be unbundled from the telecommunications building block used to provision the information service enhancements used in [ITV] services.”¹⁴ EarthLink’s suggestion that telecommunications-related regulations be imported wholesale into the existing cable regulatory framework ignores the clear differences between the telephone and cable network and service architectures -- differences which the Commission has repeatedly noted.¹⁵ Further, the FCC recently eliminated the restriction that previously limited the ability of wireline common carriers to offer consumers bundled packages of telecommunications services and CPE at a discounted price.¹⁶ And the FCC has permitted the sale of bundled equipment and services in the wireless telecommunications marketplace since 1992, acknowledging that the bundling of

¹⁴ EarthLink Comments at 16 (filed March 19, 2001).

¹⁵ See AT&T Reply Comments, filed in CS Dkt. No. 97-80 at 20-21 (Dec. 18, 2000) (“ATT Retail Sale Reply Comments”); NCTA Reply Comments, filed in CS Dkt. No. 97-80 at 36-39 (Dec. 18, 2000) (“NCTA Retail Sale Reply Comments”).

¹⁶ See *1998 Biennial Regulatory Review: Review of Customer Premises Equipment and Enhanced Services Unbundling Rules*, CC Dkt. Nos. 96-61 & 98-183, FCC 01-98, *R&O* (rel. Mar. 30, 2001).

equipment and service allowed consumers to obtain equipment and service “more economically than if it were prohibited.”¹⁷ Clearly, if the Commission is allowing for the bundling of equipment and service in the telecommunications arena, it should not impose such requirements in the ITV/cable area.¹⁸

II. Attempts to Address Issues on Retail Availability of Set Top Equipment in this NOI should be dealt with in the appropriate rulemaking, CS 97-80, which is ongoing.

A few commenters have raised concerns related to the retail availability of set-top equipment in their comments in this proceeding.¹⁹ These commenters have already raised these concerns in the FCC’s pending retail sale proceeding.²⁰ Motorola, NCTA, AT&T, and others have responded in detail to these various proposals in their comments and reply comments in the retail sale proceeding, and Motorola incorporates these comments by reference here.²¹

¹⁷ See *Bundling of Cellular Customer Premises Equipment and Cellular Service*, CC Dkt. No. 91-34, FCC 92-207, R&O (rel. June 10, 1992).

¹⁸ EarthLink’s legal analysis is incorrect as well. It confuses “telecommunications” with telecommunications service.” While it is true that cable operators may provide certain information services via telecommunications’ facilities, none of the ITV services discussed in the Notice qualifies as “telecommunications services.” See AT&T Comments, at 36-37; NCTA Comments at 44-48. Accordingly, EarthLink’s claims that the telecommunications common carrier and unbundling precedent should apply in the ITV context are wrong as a legal matter as well as being unjustified as a policy matter.

¹⁹ See e.g., MSTV Comments at 7,8; CERC Comments at 3-6.

²⁰ See, e.g., MSTV Reply Comments, filed in CS Dkt. No. 97-80 (Dec.18, 2000); CERC Comments, filed in CS Dkt. No. 97-80 (Nov. 15, 2000); CERC Reply Comments, filed in CS Dkt. No. 97-80 (Dec. 18, 2000).

²¹ See, e.g., Motorola Retail Sale Reply Comments at 10-18 (responding to proposals for mandated standardization); NCTA Retail Sale Reply Comments at 32-35 (responding to CERC arguments on equipment averaging); AT&T Retail Sale Reply Comments at 14 (critiquing CERC’s proposals to impose new standard-setting and disclosure obligations on the cable industry); Time Warner Reply Comments, filed in CS Dkt. No. 97-80, at 4-5 (Dec. 18, 2000) (responding to concerns with PHI license agreement).

We reiterate that the FCC has fulfilled its obligations under Section 629 of the Communications Act and cable operators and equipment manufacturers have met their commitments. Specifically, we restate our opposition to moving the sunset date for integrated set-top boxes closer than January 1, 2005, and, indeed, argue that the prospective ban is no longer necessary because the premise for the ban has been overtaken by market conditions.²² By inserting arguments being considered in the retail sale proceeding into this proceeding, certain commenters are overcomplicating the ITV matter and confusing issues being considered in the retail sale proceeding with issues in this proceeding.

²² See Motorola Retail Sale Comments at 12-19.

III. Conclusion

In summary, Motorola respectfully submits that the FCC should not propose regulation of the nascent ITV area and should allow this new technology to develop further before determining whether any regulatory action is needed. Motorola also believes that issues relating to the retail availability of set-top equipment should be handled in the appropriate docket, CS Docket 97-80.

Respectfully Submitted,

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